affiliates' programming limitation.[46] NYNEX disagrees, however, with the Commission's proposal to deduct those channels from the system capacity in calculating this OVS cap. Section 653(b)(1)(B) limits the OVS operator and its affiliates to "one-third of the activated channel capacity on such system" and that language entitles the OVS operator to program one-third of the total number of channels, including those activated to provide must-carry and PEG services. Thus, for example, if an open video system has 180 channels, including 10 used to provide must-carry and PEG services, the OVS operator should be able to program up to 60 of those channels.

The situation is no different with respect to local broadcast stations carried pursuant to retransmission consent. In many cases, carriage of those local broadcast signals will be essential to the competitiveness of the open video system and their carriage will thus benefit all programmers distributing programs on the system. The OVS operator should not be penalized by counting these stations against its one-third limit, thereby hampering its ability to select other programming. Such a penalty would be particularly unfair since the decision whether a broadcast station is carried pursuant to the must-carry or retransmission consent rules is in the hands of the local broadcaster, not the OVS operator.

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[46] All local broadcast stations carried by the OVS operator should be excluded from the one-third limitation, even if the OVS operator might be entitled to deny carriage to some of those stations under Sections 614 or 615 (47 U.S.C. §§ 534, 535). This approach will avoid creating an incentive for the OVS operator to limit the carriage of local broadcast stations and will further the clear Congressional objective underlying Sections 614 and 615 to protect the viability of local television stations.

3. Program Access Requirements

In the Notice, the Commission alludes briefly to the program access rules and seeks comment on how those rules should apply to OVS operators and in the context of shared channels.[47] The rigorous enforcement of those rules, and the analogous rules implementing Section 616 of the Communications Act,[48] is essential to the launch of open video systems, because, as the Commission is well aware, the success or failure of any video distribution system turns ultimately on the attractiveness of its programming.

As the Commission has consistently found, cable operators and their affiliated programmers currently control the vast preponderance of video program material available to multichannel video providers.[49] Without access to those programs, OVS operators will have scant chance of success. Accordingly, the Commission must make it clear that it intends to vigorously enforce the rules adopted pursuant to Sections 616 and 638 of the Communications Act and to give OVS operators a meaningful opportunity to distribute the programming to which those rules apply.

While vigorous enforcement of those rules will go a long way towards making desirable programming available to OVS operators and other program providers using the open video system, the program access rules under Section 638 apply only to satellite-distributed programming, not to programming distributed by cable-affiliated entities using

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[47] Notice at ¶ 61.

[48] 47 U.S.C. § 536.

[49] *See, e.g., Second Annual Report* at ¶¶ 149-56.

terrestrial systems, such as microwave or fiber optic systems. That limitation creates a potentially huge loophole, permitting cable operators and their affiliated program suppliers to monopolize the distribution of valuable programming and limit competition by start-up multichannel video providers.

As the legislative history of the 1992 Cable Act makes clear, Congress adopted Sections 616 and 638 to enhance the ability of unaffiliated cable systems and independent program producers to acquire and market their programming.[50] In order to fulfill that objective, the Commission should extend the program access requirements to all program distributors affiliated with a cable system or other multichannel video programmer.[51] Without assurance of access to non-satellite distributed programming -- much of it regional sports programming important to the success of open video systems -- local exchange carriers will be hesitant to take on the competitive challenge of open video systems.

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[50] *See* S. Rep. No 92, 102d Cong., 2d Sess. 24-29 (1992); H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 82-83 (1992).

[51] The legislative history does not contain any insight into Congress's reasons for limiting Section 628 to satellite-delivered programming. To the contrary, the Senate and Conference Reports both reflect a concern over the domination of programming by cable-affiliated entities, without any consideration as to whether the programming was distributed by satellite or by other means. *Id.* In fact, Congress was dealing with a specific problem facing the industry -- the control of satellite distributed programming by cable affiliates -- and only addressed that issue. As such, there is nothing in the 1992 Cable Act that would preclude the Commission from extending its rules to non-satellite delivered programming where, as here, facilitating access to that programming is essential to achieving Congress's goal of stimulating entry by a competitive multichannel video provider.

F. Rates, Terms and Conditions of Service

The Commission acknowledges that the provisions of Section 653(b)(1)(A) requiring that rates be "just and reasonable" and "not unjustly or unreasonably discriminatory" are not to be given their common carrier meanings, and tentatively concludes that these provisions are designed to permit unaffiliated video programmers "fair access to the open video system platform."[52] Nynex fully agrees that these terms must not be given their Title II meaning and supports the Commission's tentative conclusion to interpret them to require that OVS operators afford unaffiliated entities "fair access" to the OVS.[53]

As the Commission acknowledges, "open video system operators . . . will be 'new' entrants in established video programming distribution markets, lacking in market power vis-a-vis programming end users and subject to competition from the incumbent cable operator."[54] Thus, they will not be able to extract unreasonable prices or impose unreasonable terms and conditions on unaffiliated program providers. Rather, to be competitive, OVS operators will have to offer a diverse programming array and a different mix than that offered by the cable operator. Consequently, the economic self-interest of the OVS operator will require it to price access at reasonable rates so as to attract such

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[52] Notice at ¶ 30,

[53] NYNEX is concerned, however, about the Commission's statement that the "platform provider have the opportunity to receive reasonable compensation for the use of its facilities." Notice at ¶ 30. The reference to "reasonable compensation" has common carrier rate overtones that are clearly inconsistent with the Act. Rules for access to an open video system should be based on marketplace factors, not costs or other Title II concepts.

[54] Notice at ¶ 29.

programming. Thus, this is an ideal circumstance for the Commission to exercise its discretion under Section 401 of the Act and forbear from regulating, relying instead on the marketplace to assure that rates are "just and reasonable" and not "unjustly or unreasonably discriminatory."[55] In an analogous situation involving nondominant common carriers, the Commission has looked to the marketplace to regulate the rates of carriers without market power.[56] Experience under that regime clearly demonstrates that rate regulation is not required with respect to new entrants without market power.

If the Commission believes, however, that the Act requires it to adopt a standard for determining whether rates are "just and reasonable," NYNEX urges the Commission to gauge whether an OVS operator's rates effectively preclude others from gaining "fair access" to the system. During the early period when open video systems are being launched, the Commission should not attempt to define that standard further, but should allow the concept to be developed through the dispute resolution proceeding. That will permit the Commission to evaluate rates in a concrete factual setting and, over time, may provide the basis for defining in concrete terms the parameters of just and reasonable rates. At this juncture, there is insufficient data to permit the Commission to craft a readily enforceable test that is not unduly restrictive.

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[55] Rate regulations under Section 653 is not required to protect telephone subscribers from cross-subsidization of open video systems by regulated services. The Commission's existing cost-allocation rules provide ample protection against such cross-subsidization. *See* 47 C.F.R. §§64.901-64.904.

[56] *Policy & Rules Concerning the Interstate, Interexchange Marketplace,* CC Docket No. 96-123, FCC 96-123, released Mar. 25, 1996.

NYNEX opposes the Commission's suggestion that an appropriate measure of the reasonableness of OVS rates might be whether a given number of unaffiliated programmers acquire capacity on the system.[57] While the rate charged for access is undoubtedly one of the factors affecting a decision to enter the market, it is clearly not the only factor and may not be the dominant one. The economic vitality of the area, the penetration of the established cable operator, the presence of other video providers and the availability of attractive programming from program providers may also bear on a video programmer's decision to enter the market. Indeed, in the face of the incumbent cable operator's market position, entry will be a daunting prospect for any programmer. Thus, the willingness of unaffiliated programmers to acquire capacity on an open video system is not a valid test of the reasonableness of the OVS operator's rates.

G. Information to Subscribers

Section 653(b)(1)(E)(i) of the Communications Act prohibits an OVS operator from unreasonably discriminating in favor of itself or its affiliates "with regard to material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming on the open video system . . ." NYNEX concurs with the Commission's view that this section is "intended to be a specific application of the non-discrimination requirement contained in subsection (A)."[58] Consequently, for the reasons set forth in Sections II.A and B above, the Commission should enforce this requirement as part

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[57] Notice at ¶ 31.

[58] Notice at ¶ 48.

of the general prohibition against discrimination against unaffiliated carriers, rather than attempting to develop specific rules.

NYNEX believes, however, that the Commission has interpreted this section much more broadly than was intended by Congress. It appears to read this provision as applying to any information provided by the OVS operator to its subscribers that may influence its subscribers' future selection of programming. But the provision is drafted so that it is limited in scope to information that is provided "for the purposes of selecting programming". This language was intended to refer only to information (including advertising) provided on the on-screen programming menu that is actually used by the subscriber to make its choice of programmer or its programming selection.[59]

The broader interpretation suggested by the Commission, which would include all advertising, billing inserts, and the like, would effectively prevent the OVS operator from advertising or marketing its own programming services without also advertising and marketing the services of unaffiliated programmers to the same extent. Prohibiting an OVS operator from differentiating and promoting its own channels would substantially impair its ability to compete with other program services, diminish competition, and be a substantial deterrent to construction of open video systems by local exchange carriers.

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[59] This provision should not be interpreted to restrict the ability of the OVS operator to determine the information provided at the various gateway or menu levels. For example, OVS operators should be permitted to limit the gateway to a list of program providers and to list the programming available on the next level. Other configurations are, of course, likely to be employed, but Section 653(b)(1)(E) only requires the unaffiliated programmers and the OVS operator or its affiliate are treated the same.

H. The Certification Process.

In order to qualify for reduced regulatory burdens under new Section 653 of the Communications Act, an OVS operator must certify to the Commission that its open video system complies with the Commission's rules and the Commission must approve such certification.[60] The Commission must give public notice of the receipt of such certification and must approve or disapprove it within 10 days of its receipt.[61]

While the statutory requirement that the Commission approve or disapprove the OVS operator's certification implies that the filing should contain some information concerning the OVS system, the requirement that the Commission act within 10 days of the filing suggests that such information should be abbreviated. Indeed, it would be contrary to the statutory scheme for the Commission to require an extensive filing that would slow down what is clearly intended to be an expedited process or that would provide an opportunity for competitors to delay the process. Similarly, the Commission should not impose any requirement that an OVS operator obtain consents or satisfy any other obligation before submitting its certification. And, the certification process should not be a means by which existing cable operators or other multichannel video providers gain competitive information concerning the OVS system.

The certification itself should contain only the following information:

1) the name, address and telephone number of the OVS operator;

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[60] *See* Communications Act, Section 653(a)(1).

[61] *Id.*

2) the areas to be served by the open video system;

3) a description of the manner in which unaffiliated programmers have been or will be advised of the opportunity to gain access to the system;

4) a list of the broadcast stations eligible for carriage pursuant to the must-carry rules and the PEG capacity to be offered; and

5) a certification that the system complies with the Commission's rules, including the cost allocation requirements.

OVS operators should be permitted to file their certification at any time prior to commencement of service.

The Commission should give public notice of the filing. To expedite the provision of public notice, it could require the OVS operator to provide the text of the public notice as an attachment to its certification. If the Commission does not disapprove the certification within the statutory 10-day period, it should be deemed approved. Such approval would automatically preclude local franchising authorities from exercising any authority over the open video system, except as expressly provided in the Act.

The Commission should not require submission of additional documentation to support the OVS operator's certification, as the 10-day review period would not permit the staff to review supporting documentation. If a programmer or other adversely affected party wishes to oppose certification, they should be required to make a *prima facie* case, within the 10-day review period, that the proposed system does not comply with Commission requirements. In the absence of a *prima facie* case, the certification must be approved.

In all events, the Commission's procedures must be swift and not burdensome. The certification process must not become a means by which potential competitors or local

governments can delay or block deployment of open video systems. The Act and its legislative history make it clear that Congress does not want a repeat of the experience with video dialtone applications.

I. Bundling of Rates

The Commission requests comment on whether it should adopt regulations regarding the bundling and joint marketing of video and other telecommunications services by open video system operators, and, if so, "whether the 1996 Act's new rules concerning joint marketing of local and long distance telephone service provide a useful model."[62] NYNEX urges the Commission to resist any temptation to drag these issues into the proceeding.[63] OVS is an inchoate concept and there is no need or basis for any regulation of the marketing and bundling of OVS services and telecommunications services.[64] The thrust of the Act is to encourage competitive entry by cable operators into telephony and local exchange carriers into video distribution. As each enters the other's historic domain, they should have the flexibility to offer their services in the manner they conclude will best secure customers. As Section 401 makes clear, the Act's goal is to have telecommunications services regulated by the marketplace, and the Commission should allow the marketplace to operate, at least until

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[62] Notice at ¶ 66.

[63] The sole exception is with respect to Section 623(f) of the Communications Act, which prohibits cable operators from charging a subscriber for any service the subscriber did not affirmatively order. *See* 47 C.F.R. § 76.981 (1995). Section 653(c)(1)(A) makes Section 623(f) applicable to open video systems.

[64] *See*, Notice at ¶ 66.

there is clear evidence of abuse or market failure. The Commission can always take corrective action if the need arises.[65]

J. Dispute Resolution

As suggested in the Notice, the Commission should employ simple and expedited procedures for dispute resolution. The Commission's procedures for resolving program access complaints provide a good model for OVS dispute resolution procedures since they envision pre-filing notice to the operator, paper proceedings and limited discovery, if any.[66]

OVS operators' practices should be presumed lawful; the dispute resolution procedures should impose both the burden of proceeding and the burden of proof on the party filing the complaint. The complainant should be required to specify in detail its basis for alleging that the OVS operator is not complying with a specific requirement of the rules. Complainants alleging unjust discrimination should be required to submit with their complaints substantial evidence that (1) the OVS operator has treated the complainant in a manner that is substantially different than other, similarly-situated programming providers; (2) that such discriminatory treatment was commercially unreasonable; and (3) that such discriminatory treatment caused the complainant actual and substantial economic harm. Complaints that do not meet this standard should be summarily dismissed.

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[65] The Commission should also not use this proceeding to impose extensive regulatory "safeguards" governing the provision of open video and telecommunications services. The Act specifically provides in Section 272 where safeguards are appropriate and the Commission has proposed issuing a *Notice of Proposed Rule Making* later this month addressing those issues.

[66] *See* 47 C.F.R. § 1003.

Importantly, only unaffiliated program suppliers and those seeking access to an open video system should be able to file complaints; competitors in the market should not be permitted to tax the resources of the OVS operator and the Commission by using the dispute resolution procedure for competitive advantage.

While NYNEX generally favors the use of alternative dispute resolution procedures, it is concerned that the very short time frame established by the Act for resolution of complaints will make it difficult for the Commission to resolve a dispute if a significant portion of the 180-day period is devoted to alternative dispute resolution procedures. Nevertheless, the Commission should respect any agreement between an OVS operator and an unaffiliated program provider to submit disputes between the parties to arbitration, mediation or any other commercially reasonable procedure for dispute resolution. If a programmer files a complaint without having complied with an alternative dispute resolution procedure to which it has previously agreed, the Commission should dismiss the complaint.

K. Pre-emption of State and Local Regulation.

In implementing Section 653 of the Act, the Commission should make it clear that state or local regulation of open video systems is preempted, except to the extent that local governments receive payments in lieu of franchise fees pursuant to Section 653(c)(2)(B).[67] Preempting state and local regulation of open video systems will assure that the regulatory approach established in Section 653 is faithfully implemented and that OVS operators are not

[67] Section 653(c)(2)(B) permits franchising authorities to assess fees on the gross revenues of open video systems equal to those imposed on the local cable system.

burdened by obligations Congress did not intend to apply. Preemption will also forestall future disputes and litigation concerning state and local authority over open video systems, and thus further Congress's goal of spurring the rapid introduction of OVS services.

State and local regulation can be preempted either by Congressional or agency action. Congress may expressly preempt state and local law or, through legislation, clearly indicate its intent to "occupy the field" of regulation, leaving "no room for the States to supplement."[68] Congress has made it unmistakably clear that, in enacting Section 653, it intended to "occupy the field" of OVS regulation. That section establishes a comprehensive and streamlined regulatory scheme designed to spur the swift introduction of OVS service by telephone companies, unburdened by either common carrier regulation or local franchising requirements. Further, the Act vests complete authority in the Commission to implement its provisions: to adopt ground rules, to approve OVS operators' certifications and to resolve disputes. The comprehensiveness of the statutory scheme, the specificity with which it directs the Commission to implement its provisions, and the swiftness with which it requires

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[68] *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699-705 (1984), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Furthermore, regardless of whether Congress has preempted state or local law, the Commission itself has authority to preempt such law "to the extent it is believed that such action is necessary to achieve its purposes." *City of New York v. FCC*, 486 U.S. 57, 63 (1988). An agency's decision to preempt will not be disturbed on review if its decision represents "a reasonable accommodation of conflicting policies that were committed to the agency's care, . . . unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 64 (citation omitted). *See also, Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

Commission action so as to "hasten the development of video competition"[69] simply do not permit state or local authorities to play any role in the regulation of this service.[70]

Even if the Commission were not convinced that Congress had "occupied the field" of OVS regulation, the Commission itself should preempt all state and local regulation, except to the extent that local franchising authorities may collect fees pursuant to Section 653(c)(2)(B). Such preemption is clearly necessary to achievement of Congress's goal of fostering vigorous competition with cable operators by encouraging swift telephone company entry into local video markets.[71]

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[69] Conference Report at 173.

[70] Although the Conference Report states that OVS operators are subject to the authority of local governments to manage public rights-of-way, Conference Report at 178, the Commission should make it clear that local governments cannot exercise their authority over public rights-of-way as a subterfuge to regulate open video services provided over franchised local exchange facilities.

[71] *See City of New York v. FCC*, 486 U.S. 57 (1988); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). *Cf. Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Change Requirements of Section 315(b) of the Communications Act of 1934, as amended*, 6 FCC Rcd 7511 (1991).

CONCLUSION

For the reasons set forth above, NYNEX urges the Commission to afford OVS operators maximum flexibility and rely on the marketplace, with recourse to the Commission through the dispute resolution procedures, to regulate OVS operators. As the Commission is aware, the provision of video programming is today dominated by the cable industry and efforts to introduce competition have met with limited success. OVS operators face an uphill and expensive battle if they are to enter this market. Burdensome regulations will undoubtedly deter entry. Congress has made it clear that the Commission should encourage local exchange carriers and others to provide OVS service and, in order to achieve that objective, the Commission must resist the urge to adopt detailed and restrictive regulations. Rather, to the maximum extent feasible, the Commission should exercise the authority granted by the Act to forbear from regulation and adopt general rules that permit the OVS operator to succeed or fail in the marketplace.

Respectfully submitted,

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